



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

February 27, 2003

Ms. Kimberley Mickelson
Olson & Olson
333 Clay Street, Suite 3485
Houston, Texas 77002

OR2003-1269

Dear Ms. Mickelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177347.

The City of Seabrook (the "City"), which you represent, received a request for information pertaining to a specified officer's employment and disciplinary history. You inform us the City has made most of the officer's file available to the requestor; however, you assert the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have reviewed the information you submitted and we have considered the exceptions you claim.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. To protect information from public disclosure under common-law privacy, the information must meet the criteria established by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information is protected under the common-law right to privacy when (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Further, this office has determined some personal financial information is highly intimate or embarrassing and thus, meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 600 (1992) (Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct

deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989) (credit reports, financial statements, and other personal financial information), 373 (1983) (assets and income source information). We believe some of the information in Tabs A and B contains highly intimate or embarrassing facts and personal financial information in which the public has no legitimate interest. Accordingly, the City must withhold the information we have marked in Tabs A and B under section 552.101 in conjunction with common-law privacy.

Next, section 552.101 incorporates information protected by other statutes. Tab B contains declarations of medical condition and psychological and emotional health as required by the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.306 of the Occupations Code makes such information confidential. Specifically, section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Therefore, the City must withhold the declarations in their entirety under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Also, some of the information under Tab B consists of a medical record governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA reads in part as follows:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). The MPA permits disclosure of MPA records to the patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Occ. Code §§ 159.003, .004, .005. The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). In this instance, the requestor is not the patient at issue and the submitted information does not provide any indication that the requestor has obtained the proper consent authorizing disclosure of the medical records to the requestor. Therefore, as the City may release the MPA record, which we have marked, only in accordance with the MPA, the City must withhold these documents from the requestor. *See* Open Records Decision No. 598 (1991).

Additionally, section 1703.306 of the Occupations Code provides the following:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. Tab B contains information obtained from a polygraph examination. After reviewing the submitted documentation, we find no indication that any of the exceptions to confidentiality as provided by section 1703.306 apply in the present case. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, we have marked the information we deem confidential pursuant to section 1703.306 of the Occupations Code that the City must withhold from the requestor under section 552.101 of the Government Code.

Next, criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Chapter 411 of the Government Code specifies other entities entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Accordingly, the City must withhold all of the information in Tab C under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and Title 28, part 20 of the Code of Federal Regulations.

With respect to the information in Tab D, you have submitted representative samples of information the City has redacted or withheld from the requestor under sections 552.117 and 552.130 of the Government Code.¹ Initially, we address your obligations under the Public Information Act (the "Act"). The Act provides that "[a] governmental body that requests an attorney general decision under this subchapter shall supply to the attorney

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore, does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

general, in accordance with Section 552.301, the specific information requested.” Gov’t Code § 552.303(a). Further, the Act requires a governmental body to submit either a copy of the specific information or a representative sample of such information. Gov’t Code § 552.301(e)(1)(D). We note Tab D contains some responsive information in redacted form. Therefore, the City has not complied with the submission requirements as required by sections 552.301 and 552.303 of the Government Code.

According to section 552.302 of the Government Code, a governmental body’s failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. A government body must release information presumed public, unless it demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov’t Code § 552.302); Open Records Decision No. 319 (1982). Normally, when some other source of law makes the information confidential or the information impacts third party interests, a compelling interest exists. Open Records Decision No. 150 at 2 (1977). The applications of sections 552.117 and 552.130 of the Government Code qualify as compelling reasons to overcome the presumption of openness. Therefore, where we can discern the contents of the redacted information, we will address your arguments for withholding the information in Tab D despite your failure to comply with section 552.301. However, if we cannot make a determination as to the contents of the information, section 552.302 requires the presumption of openness. *See Gov’t Code § 552.302*. Accordingly, we have marked the information in Tab D that the City must release under section 552.302 of the Government Code.

Section 552.117(2) excepts from public disclosure information that reveals a peace officer’s home address, home telephone number, social security number, and whether the officer has family members. “Peace officer” is defined by article 2.12 of the Code of Criminal Procedure. Also, under section 552.117(2), a governmental body must withhold the officer’s *former* home addresses and telephone information from disclosure. *See Open Records Decision No. 622 (1994)*. Thus, we agree with your redactions and we have marked additional information the City must withhold under section 552.117(2).

Finally, Tab D contains information subject to section 552.130 of the Government Code. Section 552.130 excepts from public disclosure information relating to a driver’s license, license plate, or motor vehicle title or registration issued by an agency of this state. Therefore, the City must withhold all information excepted from disclosure by section 552.130. Thus, we concur with your redactions and we have marked additional information the City must withhold under section 552.130 of the Government Code.

In summary, the City must release the MPA record we have marked only in accordance with the MPA. Also, the City must release the information we have marked in Tab D in

accordance with section 552.302 of the Government Code. However, the City must withhold the following: 1) information we have marked in Tabs A and B under section 552.101 of the Government Code in conjunction with common-law privacy; 2) all declarations of medical condition and psychological and emotional health in Tab B under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; 3) information we have marked in Tab B under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; 4) all of the information in Tab C under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and Title 28, part 20 of the Code of Federal Regulations; and 5) information you have redacted and we have marked in Tab D under sections 552.117 and 552.130 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 177347

Enc: Submitted documents

c: Mr. Paul R. Lawrence
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(w/o enclosures)